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No. 88-1851

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN F. WHITE, JR., et al.,

Petitioners,

v.

MARY BENNETT, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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June 14, 1989

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should review the liability finding of the two lower courts merely because of a harmless misstatement by the Court of Appeals that the defendants had not complied with discovery orders?

2. Whether the Court of Appeals' requirement that defendants provide a one-time accounting to class members whose child support payments are illegally held by defendants violates the Eleventh Amendment where the accounting is necessary to prevent ongoing violations of plaintiffs' constitutional rights to procedural due process?

3. Whether the relief ordered by the Court of Appeals is barred by the Eleventh Amendment where the Court of Appeals expressly did not require any payment of state funds?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Mary Bennett and Michaeline Forsythe, on behalf of themselves and all other similarly situated persons, respectfully request that this Court deny the petition for writ of certiorari seeking review of the decision

of the United States Court of Appeals for the Third Circuit. That decision is reported at 865 F. 2d 1395 (3d. Cir. 1989). The liability decision of the United States District Court for the Eastern District of Pennsylvania, which the Court of Appeals affirmed, is reported at 671 F. Supp. 343 (E.D. Pa. 1987). The District Court's remedial order, which the Court of Appeals affirmed in part and reversed in part, is set forth in the appendix to petitioners' brief at 98a.

STATEMENT OF THE CASE

This case concerns child support payments that belong to the children's custodial parents. Both the District Court and the Court of Appeals found that officials of the Pennsylvania Department of Public Welfare were routinely violating class plaintiffs'[1] rights by failing to reassign child support to the custodial parents when their public assistance benefits terminated and by keeping child support payments to which the state never had any legitimate claim. The facts found by the lower courts are not in dispute. 865 F. 2d at 1402; Pet. App. at 21a; 671 F. Supp at 345, Pet. App. at 64a. Indeed, defendants submitted no evidence to refute plaintiffs' proof.

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[1] The class consists of present or former recipients of public assistance, residing in Philadelphia, whose child support is or was collected by defendants. 865 F.2d at 1398, Pet. App. at 3a.

The lower courts' findings were based in part on a set of 78 cases of persons in Philadelphia who received refunds of illegally collected support during the first quarter of 1983. Defendants admitted that in every one of these cases they violated one or more of the federal requirements governing the collection and distribution of child support paid on behalf of present or former AFDC recipients. C.A. App. III, 323-480, IV, 483-88.[2] Petitioners do not dispute the District Court's finding that they took an average of five and one-half months to reassign support to former recipients after the former recipients stopped receiving public assistance, 671 F. Supp. at 345-46, Pet. App. at 68a-69a, in violation of federal law which requires immediate

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[2] "C.A. App." designates the appendix filed in the Court of Appeals. Roman numerals refer to volume numbers; arabic numerals refer to page numbers.

reassignment. See 42 U.S.C. § 602(a)(26); 42 U.S.C. §§ 654(5); 45 C.F.R. § 302.51(f). Nor do petitioners dispute the finding that they took an average of more than nine months to authorize a refund of the illegally collected support and an additional one to two months to make payment. 671 F. Supp. at 346, Pet. App. at 72a. These delays denied former recipients the child support on which they were depending for their children's needs. 671 F. Supp. at 346-47, Pet. App. at 72a-74a.

Petitioners also do not dispute the lower courts' finding that in 46 of the 78 cases defendants refunded less than the amount owed, an error rate of almost 60 percent. 865 F.2d at 1401, Pet. App. at 24a; 671 F. Supp. at 348-49, Pet. App. at 34a.

Despite this pattern of abuse, petitioners asserted below, and continue to assert in this Court, that the 78 cases are

not representative. According to petitioners, the 78 cases constitute only a small percentage of the relevant universe and therefore do not establish a sufficient degree of violation to warrant injunctive relief.[3]

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[3] Petitioners suggest that the relevant universe consists of the 139,000 open child support cases during a different quarter. Pet. at 13. This is absurd. In fact, the universe consists of approximately 200 cases. The 139,000 child support cases count every absent parent for each welfare case, whether or not there is a support order, and whether or not child support is collected. C.A. App. VI, 824. As petitioners acknowledge, support was actually collected in only 10,000 of those cases, or about 7%. Pet. at 13. Petitioners neglect to point out that only 3,000 of the open child support cases closed during the quarter. C.A. App. VI, 822. Assuming that support was actually collected in 7% of these cases, there were a little over 200 cases that closed during the quarter in which there was a child support collection. Because the relevant universe of cases that closed in which child support was actually collected consists of approximately 200 cases, the 78 cases from the first quarter of 1983 produced by defendants evidently constitute a very large sample of the total.

This argument was rejected by both of the lower courts, in part because defendants failed to provide the data necessary to establish a statistically valid sample. As the Court of Appeals pointed out, defendants claimed they could not respond to discovery requests concerning AFDC recipients whose benefits terminated when child support payments made them ineligible for public assistance. Defendants also did not comply with federal requirements that they report on a quarterly basis the number of AFDC cases that closed in which child support was collected. Because defendants did not supply the necessary data for a fully representative cross-section, the Court of Appeals rejected their argument that the set of 78 cases was not sufficiently representative. 865 F.2d at 1401; Pet. App. at 23a-24a; see C.A. App. II, 299-301, 309; VI, 822.

Moreover, petitioners concede that the 78 cases are "fairly representative" of cases in which they make a refund after they have erroneously collected a former recipient's child support. Pet. at 16. The error rate in this undeniably valid sample of refunds was almost 60%. Petitioners do not explain why this is "a minuscule percentage of cases." Pet. at 18.

Petitioners' claims of compliance with federal law rely solely on two federal audits. However, neither federal audit looked at a statistical sample of child support cases in Philadelphia and neither audit addressed whether former recipients were receiving the support that belonged to them.[4] Indeed, as the Court of Appeals and

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[4] One of the two audits to which petitioners refer examined only 98 cases statewide. C.A. App. V, 751. The other did not look at a single case in Philadelphia. C.A. App. V, 672-73.

the District Court pointed out, federal audits have found that the Philadelphia Family Court, which is under contract with defendants to collect and distribute child support for AFDC recipients in Philadelphia, holds substantial sums on account for long periods of time instead of distributing them promptly. 865 F.2d at 1402, Pet. App. at 24a; 671 F. Supp. at 347, Pet. App. at 75a; see C.A. App. V, 650, 751.

As the lower courts found, the class members were not in a position to initiate claims for the child support which defendants were illegally holding because the class members had no way of knowing that defendants were collecting and keeping their property. An application for AFDC benefits operates as an automatic assignment of child support rights to the state, whether or not there is a support order and whether or not any child support

is being paid at the time of the assignment. 42 U.S.C. § 602(a)(26)(A); 45 C.F.R. § 232.11. Unless the state provides notice of child support collections, an AFDC recipient has no way of knowing whether and how much support the absent parent is paying, or whether the support that is paid exceeds the children's public assistance. When AFDC benefits end, the former recipient has no way of knowing whether any support is being paid, or whether the state is continuing to collect it even though the assignment has legally terminated. 671 F. Supp. at 349-50, Pet. App. at 88a-90a; C.A. App. at 793-94. The lower courts found that defendants did not begin sending even rudimentary notice of support collections until 1986, and further found that the notice did not contain sufficient information for class members to determine whether they had claims for child support that was being held by the state.

865 F.2d at 1402, Pet. App. at 27a-28a; 671 F. Supp. at 350, Pet. App. at 91a-93a.

Based on this record, both of the lower courts held that defendants violated the federal statute and regulations governing the states' collection and distribution of child support. The lower courts also held that defendants' failure to refund all of the support that they had illegally collected worked an uncompensated taking of plaintiffs' property. And, because defendants never provided any notice of the child support that they had collected and illegally retained, the lower courts held that defendants deprived plaintiffs of their property without procedural due process. 865 F.2d at 1401-02, 1404-05, Pet. App. at 21a-28a, 38a-43a; 671 F. Supp. at 348-50, Pet. App. at 82a-83a, 87a, 92a-93a.

To remedy the procedural due process violation, the Court of Appeals held that

defendants should have been ordered to provide "an accounting notice which includes the agency's calculations of support payments and AFDC assistance payments against which they are offset." 865 F.2d at 1405, Pet. App. 42a-43a. Defendants are mandated by federal law to perform these calculations on a monthly basis to determine whether the family is entitled to any of the support collected on its behalf. See 42 U.S.C. § 657; 45 C.F.R. §§ 232.20(b)(1), 302.51(b),(f). The Court of Appeals therefore concluded that requiring defendants to provide plaintiffs with the calculations would significantly reduce the risk of erroneous deprivation of plaintiffs' property without unreasonably increasing the burden on defendants. 865 F.2d at 1404-05, Pet. App. at 40a-43a.

Because class members whose child support has already been collected by defendants received no notice whatsoever

that defendants were collecting their property and no notice from which they could determine whether a refund is owed, the Court of Appeals held that defendants were required to audit their records to identify and send notice to class members whose moneys are being illegally retained by defendants. The Court of Appeals also ordered defendants to refund the child support that they are illegally keeping, but only "to the extent that [defendants] will be reimbursed by the United States." 865 F.2d at 1405, 1407-08, Pet. App. at 42a, 55a-59a.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS' HARMLESS MISSTATEMENT THAT DEFENDANTS DID NOT COMPLY WITH DISCOVERY ORDERS DOES NOT MERIT REVIEW.

Petitioners seek review on the ground that the "Court of Appeals decided the liability part of this case by sua sponte imposing discovery sanctions." Pet. at 23. In fact, the Court of Appeals never imposed any discovery sanctions, although it did mistakenly refer to discovery orders. Review should be denied because the Court of Appeals did not impose discovery sanctions, because its minor imprecision with respect to the existence of discovery orders does not affect the correctness of the decision below, and because, in any event, the Court of Appeals' misstatement is not of sufficient importance to merit review.

1. There is no merit to petitioners' assertion that the Court of Appeals imposed discovery sanctions. Rather, the Court of Appeals drew justifiable inferences from defendants' failure to supply information in response to discovery requests and defendants' noncompliance with federal reporting requirements. In drawing these inferences, the Court of Appeals referred to the sanctions that may be imposed pursuant to Fed. R. Civ. P. 37(b)(2)(A) where a party does not comply with discovery, but certainly did not impose those sanctions. 865 F.2d at 1401, Pet. App. at 23a 24a. Petitioners' chief reason for seeking review is therefore utterly without basis.

2. The Court of Appeals' minor misstatement with respect to discovery orders does not alter the correctness of its decision on liability and is equally unworthy of review by this Court. Although

the record is clear that defendants did not provide information in response to discovery requests, the Court of Appeals incorrectly stated that defendants had not complied with discovery orders. The Court of Appeals made this misstatement in the course of listing a number of reasons for rejecting petitioners' argument that the District Court had erred in finding them liable. These reasons included defendants' failure to provide information in response to discovery requests, and defendants' failure to comply with federal reporting requirements, as well as federal audits which determined that defendants did not properly disburse child support collections. 865 F.2d at 1401-02, Pet. App. at 22a-25a.

In addition, and most significantly, the Court of Appeals based its liability finding on the uncontroverted evidence that defendants routinely violated federal law.

The record contains hundreds of defendants' admissions establishing that they illegally collected child support to which they had no legitimate claim. These admissions also prove that defendants retained the illegally collected child support for months or even years before making refunds to the former public assistance recipients to whom it belonged. In 60% of the cases defendants never refunded the correct amount. In none of the cases did the defendants provide any notice that they were holding plaintiffs' child support.

This evidence stands unrebutted. 865 F.2d at 1402, Pet. App. at 25a. Defendants did not come forward with an iota of evidence in rebuttal, even though all of the records were in defendants' control. Defendants did not even cite to a single case in which they did not commit one or more violations of class members' child support rights.

The Court of Appeals therefore correctly concluded, as did the District Court, that the evidence of class-wide violation justified injunctive relief. Because the decision below is correct, the petition should be denied.

3. Even if the Court of Appeals' inexactness undermined the correctness of its liability determination, the error would not warrant review. Certiorari jurisdiction does not exist for the purpose of correcting errors in lower court decisions where, as in this case, no broader issue is presented. See Ross v. Moffitt, 417 U.S. 600, 616-17 (1974). Moreover, this case is particularly fact-intensive: the liability decisions of the two lower courts turn solely upon the specific facts of this case. Certiorari is therefore not appropriate. See, e.g., NLRB v. Hendricks County Rural Electric Corp., 454 U.S. 170, 176 n.8 (1981).

II. THE COURT OF APPEALS DID NOT REQUIRE RETROACTIVE RELIEF OR PAYMENT OF ANY FUNDS FROM THE STATE TREASURY.

The Court of Appeals held that the District Court should have required the defendants to audit the records of class members in order to identify and notify class members whose child support is being illegally held. The Court of Appeals further held that the District Court should have required the defendants to refund to the class members the amount of any illegally collected child support which defendants had turned over to the federal government to the extent that defendants would receive reimbursement from the federal government for these refunds. These holdings are fully consistent with this Court's decisions construing the Eleventh Amendment.

1. The audit required by the Court of Appeals is necessary to prevent the ongoing violation of plaintiffs' procedural due process rights. Under the child support system, all applicants for AFDC benefits are required to assign their children's support rights to the state, whether or not there is a support order, and whether or not support is actually collected. 42 U.S.C. § 602(a)(26)(A); 45 C.F.R. § 232.11. Unless the state provides notice to recipients that support has been collected, recipients have no way of knowing whether and how much support the absent father is paying for the children. Recipients therefore have no way of knowing that the state is collecting support in excess of the AFDC benefits for the children or that the state is continuing to collect and keep their children's support payments after they are no longer receiving public assistance.

This case was filed in 1979. Defendants did not begin providing even rudimentary notice of support collections until 1986. 865 F.2d at 1402, Pet. App. at 27a-28a. Meanwhile, as the evidence established, defendants illegally collected and kept support payments to which they had no legitimate claim. Based on this unusual set of facts, the Court of Appeals held that the Due Process Clause of the Fourteenth Amendment requires defendants to provide "an accounting notice which includes the agency's calculations of support payments and AFDC assistance payments against which they are being offset" so that class members can "initiate collection efforts in the event of illegal retention of their support payments." 865 F.2d at 1404-05, Pet. App. at 39a-43a. Petitioners do not challenge this holding. Pet. at 12 n.2. However, petitioners argue that they are only required to provide

notice of child support which they collect in the future, and have no obligation to remedy their ongoing failure to provide notice of previous collections.

This Court could not adopt petitioners' narrow construction of the permissible scope of due process remedies without overruling the well-established principle that notice and an opportunity to be heard must be provided "before a State finally deprives a person of his property interests." Parratt v. Taylor, 451 U.S. 527, 540 (1981). "Failure to give notice violates 'the most rudimentary demands of due process of law.'" Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 108 S.Ct. 896, 899 (1988) (quoting Armstrong v. Manzo, 380 U.S. 545, 550 (1965)). At a minimum, the state must make available "some meaningful means by which to assess the propriety of the State's action at some time after the initial taking." Parratt,

451 U.S. at 539. Here, the class members have no way of knowing that they have property for which they can make a claim. The Court of Appeals' audit requirement simply provides them with a remedy for defendants' continuing violation of their procedural due process rights. There is no precedent whatsoever for petitioners' argument that the Eleventh Amendment bars a remedy for defendants' continuing refusal to provide the procedural protections required by due process.

Because the audit mandated by the Court of Appeals is designed to prevent defendants' continued denial of plaintiffs' rights to notice of the deprivation of their property, the remedy is prospective, not retrospective, and is not foreclosed by the Eleventh Amendment: "[R]elief that serves directly to bring an end to a present violation of federal law is not barred by the Eleventh Amendment even

though accompanied by a substantial ancillary effect on the state treasury." Papasan v. Allain, 478 U.S. 265, 278 (1986) (citing Milliken v. Bradley, 433 U.S. 267, 289-90 (1977), and Edelman v. Jordan, 415 U.S. 651, 667-68 (1974)).

Quern v. Jordan, 440 U.S. 332 (1979), on which petitioners rely, does not foreclose the relief ordered by the Court of Appeals in this case. Unlike this case, Quern did not involve the taking of vested private property rights with no notice or opportunity to be heard. The question in Quern was whether a federal court has the power to order state officials to provide a brief explanatory notice to public aid applicants of the availability of state procedures to determine whether they are eligible for past benefits which they were erroneously denied.[5] There was no

[5] The Court in Quern affirmed the court of appeals' approval of a limited form of notice which gave the class members

procedural due process issue.[6] Consequently, Quern only addressed the extent to which notice relief may be ancillary to other prospective relief so as not to be barred by the Eleventh Amendment.

In this case, unlike Quern, the audit required by the Court of Appeals is not merely ancillary to other prospective

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"no more . . . than what they would have gathered by sitting in the courtroom." 440 U.S. at 346-49. As this Court later stated, the court of appeals' notice was "justified as a mere case-management device" ancillary to other prospective relief. Green v. Mansour, 474 U.S. 64, 71 (1985).

[6] Plaintiffs in Quern had challenged the state's delays in processing and approving public assistance applications as violating the federal regulations and the Equal Protection Clause. See Edelman v. Jordan, 415 U.S. 651, 655-56 (1974). There was no claim that the state had violated either the Due Process Clause or federal regulations which require notice to public assistance applicants of any action by the state agency affecting their claims for benefits. See 45 C.F.R. § 205.10(a)(3). The Quern plaintiffs had apparently been afforded all of the process to which they were entitled.

relief, but is prospective relief, necessary to correct defendants' ongoing violations of plaintiffs' due process rights. The limitations imposed on the notice in Quern are therefore inapplicable. Nothing in Quern prevents a federal court from ordering state officials to provide the notice required by the Due Process Clause so that the class members can assert their rights to any child support payments which defendants have illegally retained. Class members who have no way of knowing whether defendants have already illegally collected and kept their child support payments are no less entitled to notice and an opportunity for a hearing than are class members whose support is currently being collected by defendants. Where notice is necessary to prevent ongoing deprivations of constitutional rights, the Eleventh Amendment limitation on the Article III power of federal courts does not bar a

federal court from ordering notice as an independent form of relief. Accord, Green v. Mansour, 474 U.S. 64, 71 (1985).

2. Pursuant to the Court of Appeals' decision, the defendants must refund illegally collected child support only "to the extent that [they] will be reimbursed by the United States" for such refunds. 865 F.2d at 1408, Pet. App. at 59a. This holding also does not conflict with any decisions of this Court. The Court of Appeals did not, as petitioners assert, order defendants to pay "retroactive benefits" or levy any "expense [which] will be borne by the state treasury." Pet. at 37; i. Because the Court of Appeals did not impose any liability which must be paid from the state's general revenues, its decision is fully consistent with Edelman v. Jordan, 415 U.S. 651 (1974).

Under the federal child support scheme, when the state retains child

support collections made on behalf of AFDC recipients, it is required to reimburse the federal government to the extent of the federal government's participation in the financing of the AFDC benefits paid by the state. 42 U.S.C. § 657(b)(2), (4). The federal share of the collection is not actually sent to the federal treasury. Instead, the federal share of the child support collection is used to reduce the amount which the state can draw from the federal treasury for the state's AFDC program. 42 U.S.C. § 603(b); 45 C.F.R. § 201.5.

If the state collects and retains a child support payment which should have been distributed to a current or former AFDC recipient, then the federal allocation to the state for the quarter after the collection is reported is incorrectly reduced by an amount equal to the federal share of the collection. When the error is

discovered, it is corrected by increasing the federal government's allocation to the state for the next quarter. 42 U.S.C. § 603(b)(2). Consequently, as the Court of Appeals concluded, an order requiring the state to return to plaintiffs the federal share of the child support payments which the state has illegally collected and retained has no impact whatsoever on the state treasury because the state's allocation for the next quarter will be correspondingly increased.

The child support reimbursement scheme is therefore fundamentally different from the matching system for public assistance benefits which were at issue in Edelman. In the case of federal-state public assistance benefits, the federal government's share is paid only as a match for state expenditures. 42 U.S.C. § 603(a),(b). See Shea v. Vialpando, 416 U.S. 251, 253 (1974). The federal share

will not be paid unless the state matches the payment. Consequently, an order for payment of the federal share of federal-state public assistance benefits would necessarily require payment of the state share, a result which Edelman expressly prohibits. On the other hand, an order requiring the state to refund the federal share of an erroneously collected child support payment would not entail return of the share which the state has retained, and is not barred.

The Court of Appeals' interpretation of Edelman is in accord with the decisions of other courts of appeals which have held that retroactive relief requiring the state to pay government benefits is not barred by the Eleventh Amendment where the state will be reimbursed for the payment by the federal government. See, e.g., Foggs v. Block, 722 F.2d 933, 941 n.6 (1st Cir. 1983), rev'd on other grounds sub nom.

Atkins v. Parker, 472 U.S. 115 (1985); Harrington v. Blum, 639 F.2d 768 (2d Cir. 1980), aff'g per curiam 483 F. Supp. 1015, 1021 (S.D.N.Y. 1979).[7] See also Robinson v. Block, 869 F.2d 202, 214 n.11 (3d Cir. 1989). Thus, where a state can pay for retroactive relief without using state funds, the Eleventh Amendment does not bar an order to make payment. See Fernandez v.

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[7] A number of other courts since Edelman have also explicitly held that the Eleventh Amendment does not bar an order requiring a state to pay for retroactive relief for which the state would be reimbursed by the federal government. See, e.g., Wilson v. Lyng, 662 F. Supp. 1391, 1396 (N.D.N.C. 1987), rev'd on other grounds, 856 F.2d 630 (4th Cir. 1988); Collins v. Marshall, 507 F. Supp. 83, 85 (W.D. Mo.), rev'd on other grounds sub nom. Collins v. Donovan, 661 F.2d 705 (8th Cir. 1981); Witter v. Pennsylvania National Guard, 462 F. Supp. 299, 306 n.9 (E.D. Pa. 1978). However, two cases have held that an order to pay retroactive federal food stamps was barred where, in contrast with this case, there were no ongoing violations of federal law. Cotton v. Mansour, 863 F.2d 1241 (6th Cir. 1988); Colbeth v. Wilson, 554 F. Supp. 539 (D. Vt.), aff'd per curiam sub nom. Colbeth v. O'Rourke, 707 F.2d 57 (2d Cir. 1983).

Chardon, 681 F.2d 42, 59 (1st Cir. 1982), aff'd on other grounds sub nom. Chardon v. Fumero Soto, 462 U.S. 650 (1983).

The rule prohibiting a retroactive award of public benefits to be paid from state funds rests on the concept that the state's power to allocate scarce tax revenues is essential to its sovereignty. As this Court noted in Edelman,

> [W]here the State has a definable allocation to be used in the payment of public aid benefits, and pursues a certain course of action such as the processing of applications within certain time periods . . . , the subsequent ordering by a federal court of retroactive payments to correct delays in such processing will invariably mean there is less money available for payments for the continuing obligations of the public aid system.

415 U.S. at 666 n.11. The Court of Appeals' requirement that defendants refund the illegally collected child support to the extent that they will be reimbursed by the federal government, like the relief

ordered in the cases dealing with wholly federally funded benefits, would not affect the state's ability to allocate scarce tax revenues. The Eleventh Amendment is not implicated by relief which would have no impact on state funds.

Indeed, because of the unusual circumstances of this case, the Court of Appeals' order does not involve the payment of funds that belong to either the federal or the state governments, but only the return of that portion of plaintiffs' property which the federal government is holding because of the state's illegal collection. Far from requiring payment of state funds, as petitioners argue, the relief ordered by the Court of Appeals does not even require payment from federal tax revenues. Because the relief ordered by the Court of Appeals would not be paid with either state or federal funds, it is not barred by the Eleventh Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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